

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Amendment of Part 90 of the)
Commission's Rules to Facilitate)
Future Development of SMR Systems)
in the 800 MHz Frequency Band)

PR Docket No. 93-144
RM-8117, RM-8030
RM-8029

Implementation of Sections 3(n))
and 322 of the Communications Act)
Regulatory Treatment of Mobile Services)

GN Docket No. 93-252

Implementation of Section 309(j))
of the Communications Act --)
Competitive Bidding)

PP Docket No. 93-253

To: The Commission

PETITION FOR RECONSIDERATION

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EXECUTIVE SUMMARY

Digital Radio, L.P. ("Digital Radio") requests the Commission to reconsider its decision to eliminate the five year extended implementation schedule because it (1) unfairly undermines incumbent licensees who have relied on these grants; (2) unlawfully deprives these licensees of vested property interests and (3) ignores the comments of small and medium-sized SMR licensees who have objected that the decision will interfere with their opportunity to compete in the Commercial Mobile Radio Services ("CMRS") marketplace.

Digital Radio structured its business plan in reliance on a five-year grant of extended implementation authority. The 800 MHz Order eliminated this five-year period and virtually ensured that Digital Radio will lose its licenses and its associated investment because, in all likelihood, it will not be able to finish its wide-area system in the shortened implementation period.

The Commission's actions are unlawful and unfair. In addition to undermining the reliance interests of individual licensees, the elimination of incumbents' extended implementation periods also deprives incumbents of a property interest in violation of due process. Further, the 800 MHz Order fails to adequately address the concerns of small and medium-sized SMR providers that cutting short construction periods will undercut competition in the CMRS marketplace and eliminate opportunities for new entrants.

Finally, eliminating extended implementation authority is not the least restrictive alternative available to the Commission to

facilitate its proposed auction of Economic Area SMR licenses. As one less restrictive alternative, the Commission could permit incumbents with extended implementation authority to sell their partially constructed facilities to EA applicants and licensees. Such a minor exception to the Commission's rule against transfer of unconstructed SMR facilities supports competition and works with market forces, while upholding the reliance interests of Commission licensees, far better than does the unlawful and unfair elimination of incumbents' extended implementation authority.

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TO: THE COMMISSION

PETITION FOR RECONSIDERATION

Pursuant to Section 1.106 of the rules and regulations of the Federal Communications Commission ("FCC" or "Commission"),¹ Digital Radio, L.P. ("Digital Radio") hereby petitions the Commission to reconsider its decision in the First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making in the above-captioned matter ("800 MHz Order")² to eliminate the extended implementation authority of incumbent Specialized Mobile Radio ("SMR") licensees.

¹ 47 C.F.R. section 1.106 (1995).

² First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making, PR Docket No. 93-144, GN Docket No. 93-252, PP Docket No. 93-253, FCC 95-501, paras. 110-112 (Dec. 15, 1995).

STATEMENT OF INTEREST

In 1993-1994, Digital Radio was granted 44 SMR licenses in the Mid-Atlantic and Central Atlantic regions which it will use to provide regional, wide-area SMR service using advanced digital technology. On February 27, 1995, Digital Radio was granted extended implementation authority for five years, allowing it until the year 2000 to construct and place in operation its regional SMR system.³ Digital Radio has relied on this grant of extended implementation authority in making its business plans, including arranging its financing, its equipment purchases, its construction and operating schedule and its marketing and sales activities. Elimination of slow growth implementation as set forth in the 800 MHz Order would drastically disrupt this planning and set an unrealistic deadline for Digital Radio to place its SMR system in operation. Accordingly, Digital Radio has a significant interest in this proceeding and has standing to petition for reconsideration under the Commission's rules.

DISCUSSION

I. Eliminating Existing Extended Implementation Periods Unfairly Harms Incumbent SMR Providers.

A. The 800 MHz Order Destroys Business Expectations.

The 800 MHz Order, adopted December 15, 1995, drastically curtails the opportunity for many incumbent SMR licensees to construct and place into operation their wide-area SMR systems.

³ Letter to Frederick J. Day, Counsel for Digital Radio, from Terry L. Fishel, Chief, Land Mobile Branch of FCC Private Radio Bureau (Feb. 27, 1995).

When Digital Radio and similarly situated SMR licensees were granted extended implementation authority, the Commission's "slow growth" rules authorized up to five years for constructing a wide-area SMR system and placing it in operation.⁴ Like many other SMR licensees planning to build wide-area SMR systems, Digital Radio was granted the full five years authorized by the Commission's slow growth rules to construct its system and commence operations. Digital Radio developed its long range business plans based on the assumption it would have five years to complete its regional, wide-area SMR systems. Nothing in the Commission's rules suggested that extended implementation authority would be cut short.⁵ To the contrary, the Commission previously stated that the five-year extended implementation period strikes a useful balance, allowing "sufficient [time] to enable licensees to plan and construct their systems and, at the same time, to ensure that scarce spectrum is used."⁶

Under the 800 MHz Order, an SMR licensee's deadline for constructing its wide-area SMR system is reduced to a maximum of two years, and could be eliminated altogether.⁷ Within 90 days of the effective date of the 800 MHz SMR Order, SMR licensees with

⁴ 47 C.F.R. section 90.629 (1995); See also Matter of Amendment of Part 90 of the Commission's Rules Governing Extended Implementation Periods, 8 FCC Rcd 3975 (1993) ("Extended Implementation Order").

⁵ 47 C.F.R. section 90.629 (1995).

⁶ Extended Implementation Order, 8 FCC Rcd at 3976 (1993).

⁷ 800 MHz Order, at para. 112.

extended implementation authority must rejustify their extended implementation authority.⁸ If the Commission decides that extended implementation has been rejustified, the licensee "will be afforded a construction period of two years or the remainder of its extended implementation period, whichever is shorter," regardless of how much additional time the licensee would have had under its original grant of extended implementation.⁹

In a similar situation in another proceeding, the Commission recently emphasized the "strong public interest" in upholding a licensee's business plans made in reliance on Commission rules:

[R]equiring the relinquishment of a provider's allotment of channels after it has made business plans and has begun providing service to customers is detrimental to the provider's business ... Therefore, there is a strong public interest in establishing some level of certainty in providers' expectations....¹⁰

For the Commission to destroy Digital Radio's business expectations as a result of a midstream change in its rules is wholly inconsistent with this strong public interest. For it to do so at the same time that it has acknowledged that such a rule change would be unfair for other Commission licensees is unfair and borders on arbitrary and capricious behavior.

⁸ 800 MHz Order at para. 111.

⁹ Id. at paras. 111-112.

¹⁰ Implementation of Section 302 of the Telecommunications Act of 1996 -- Open Video Systems, Report and Order and Notice of Proposed Rulemaking, CS Docket No. 96-46, FCC 96-99, at para. 25 (March 11, 1996).

B. Eliminating Extended Implementation Unfairly and Unlawfully Denies Incumbents' Property Rights.

Not only is a drastic curtailment of the licensee's rights and expectations extremely inequitable, it also constitutes an unlawful deprivation of a property interest. Commission licensees enjoy a constitutionally protected property interest in their FCC licenses and continuation of those licenses.¹¹ To deny or revoke such a license without cause constitutes a denial of the licensees' due process rights.¹²

In Digital Radio's case, implementation of the rules adopted by the Commission in the 800 MHz Order will almost certainly result in Digital Radio's loss of its licenses. It will be virtually impossible for Digital Radio to complete its system in the shorter two-year period created by the 800 MHz Order. For a small business such as Digital Radio, such drastic changes in its construction schedule can be fatal because every month of the five-year extended implementation period is needed to construct and operate the 44 stations in its two regional wide-area systems. For the Commission to change these previously authorized deadlines midstream so as to make compliance impossible (as the 800 MHz Order does) unlawfully

¹¹ See RKO General, Inc. v. FCC, 670 F.2d 215, 235-36 (D.C. Cir. 1981); Industrial Safety Ass'n v. EPA, 656 F.Supp. 852 (D.D.C. 1987), aff'd, 837 F.2d 1115 (D.C. Cir. 1988) ("it is well settled that an agency license can create a protectible property interest such that it cannot be revoked without due process of law.")

¹² Easter House v. Felder 910 F.2d 1387, 1404 (7th Cir. 1990) (substantive due process violation from denying continuation of license); RKO General, Inc. v. FCC, supra, (absent misconduct before agency, FCC is bound by due process before denying license or denying renewal).

and unfairly deprives Digital Radio of its property interests. Accordingly, the Commission should reconsider its decision to eliminate slow growth implementation authority.

C. Eliminating Extended Implementation For Existing Licensees Undercuts Competition in the CMRS Marketplace By Limiting Opportunities for New Entrants.

In addition to the damage that eliminating extended implementation will cause to individual licensees, the 800 MHz Order will cause damage to the public and the Commercial Mobile Radio Services ("CMRS") industry as a whole by destroying opportunities for small and mid-sized SMR providers to enter the CMRS marketplace in a competitive fashion. As shown below, the Commission's previous orders on this subject consistently emphasize the importance of encouraging competition in the CMRS marketplace. In addition, commenting parties to the 800 MHz Order rulemaking raised concerns about the competitive impact of the Commission's proposals.¹³ The 800 MHz Order fails to adequately address these concerns, however, and fails to explain why competition in the CMRS industry will not suffer.

A primary reason the Commission originally authorized extended implementation authority was to encourage development of more competitive wide-area, digital SMR systems.¹⁴ The Commission has previously stated that allowing SMR systems the opportunity to

¹³ See, e.g., Pittencrief Ex Parte Comments; Cumulous Comments; 800 MHz Order at para. 108.

¹⁴ Fleet Call, Inc., 6 FCC Rcd 1533, recon. dismissed, 6 FCC Rcd 6989 (1991); Letter from Ralph A. Haller, Chief, Private Radio Bureau to David Weisman, DA 92-1734, 8 FCC Rcd 143 (1993).

install advanced digital technology to establish wide-area systems is essential to maintaining competition in the CMRS marketplace.¹⁵ SMR systems must compete with cellular systems and Personal Communications Services ("PCS") providers on an uneven playing field because of discriminatory regulatory burdens and excessive costs of providing service.¹⁶ Eliminating extended implementation authority will only make it more difficult for SMR providers to compete in the CMRS marketplace.

Similarly, eliminating the possibility of obtaining extended implementation authority acts as a disincentive to potential SMR entrants into the CMRS marketplace. The Commission has specifically expressed an interest in attracting new entrants to the CMRS marketplace.¹⁷ SMR providers have been a chief source of such potential competition.¹⁸ Both the 1993 Omnibus Budget Reconciliation Act and the 1996 Telecommunications Reform Act confirm Congress' intent that the CMRS marketplace remain open to competitive entry from all types of providers.¹⁹

¹⁵ Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Second Report and Order (1994) at para. 143 ("Second CMRS Report and Order").

¹⁶ Id. at para. 143; Matter of Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services, Third Report and Order, at paras. 85, 95, 96 & n. 194 ("Third CMRS Report & Order").

¹⁷ See, e.g., Third CMRS Report and Order, para. 239 (expressing concern that largest wireless companies "inhibit market entry by other service providers").

¹⁸ Second CMRS Report and Order at para. 143.

¹⁹ See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, section 6002(b) (1993) ("1993 Budget Act") (revising Section 332 to create similar regulatory treatment of similar services and to promote competition); Telecommunications Act of

By eliminating extended implementation authority, however, the 800 MHz Order undermines these goals. Small to mid-sized incumbent SMR licensees may be pushed out of the CMRS marketplace by the changes in extended implementation for the following reasons.

First, smaller SMR incumbents like Digital Radio desperately need the full five years made available in most extended implementation grants to complete construction of their systems and place them in operation. Unlike the largest SMR providers, mid-sized to smaller SMRs have less flexibility and fewer resources at their disposal to complete construction and operation of their systems in a shorter period of time.

Second, to the extent that extended implementation is replaced by auction of wide-area SMR licenses, mid-sized to small SMR incumbents will likely become even less competitive in the CMRS marketplace. Because of their limited resources (significant portions of which are invested in the SMR systems whose construction periods will be cut short), mid-sized to small SMR providers are not as likely to succeed in acquiring spectrum for their current markets via an Economic Area ("EA") auction. The largest SMR providers, such as Nextel, will gain a competitive advantage because they can purchase wide-area EA licenses at auction and continue with their business plans while incumbents are forced to close shop or relocate. Experience with auctions to date has shown that the winners are typically a few of the industry's

1996, section 253 (removal of barriers to entry) and section 257 (competitive market access).

largest companies and that smaller companies "may have difficulties competing for 800 MHz SMR licenses against large firms with significant financial resources."²⁰ Accordingly, it is unlikely that a mid-sized to smaller incumbent licensee will be able to replace its reliance on existing extended implementation authority with an EA license won at auction.

In sum, the Commission should reconsider the 800 MHz Order's elimination of extended implementation periods for incumbent SMR licensees because such a change in Commission rules will have detrimental consequences for both the affected licensees and the CMRS marketplace as a whole.

II. Authorizing Transfer of Unconstructed Facilities Is A Less Restrictive Method For Resolving Extended Implementation.

The primary reason advanced by the Commission for eliminating extended implementation authority is that extended implementation would interfere with the Commission's plan to change SMR licensing to a system of wide-area EA licenses distributed by auction. The 800 MHz Order states:

Specifically, we believe that allowing licensees to retain extended implementation authority of up to five years after our adoption of the wide-area licensing approach detailed in this First Report and Order would impinge upon the construction requirements imposed on EA licensees....If certain channels remain unconstructed but authorized to another entity for this three-year period [in which EA licensees will be required to construct their systems], the EA licensee is estopped not only from

²⁰ 800 MHz Order at para. 254. In the broadband PCS auction, for example, three entities received the vast majority of licenses in major markets and paid millions of dollars for those licenses. Those entities were backed by the resources of the Sprint-cable wireless venture (WirelessCo), AT&T (AT&T WirelessCo), and three of the Bell Operating Companies (PCS PrimeCo).

utilizing the channel(s) directly but also from acquiring it from the holder of the authorization due to our prohibition against the transfer of unconstructed facilities. As a result, we believe that it is necessary not only to cease acceptance of requests for extended implementation authority but also to accelerate the termination date of existing implementation periods so that EA licensees will not be unnecessarily hampered in their efforts to comply with the construction requirements associated with their authorizations.²¹

Interestingly, the Commission's identification of this potential problem also highlights alternative solutions which would be far less drastic in their impact on incumbent extended implementation grantees. Most obvious, the Commission could make an exception to its prohibition against the transfer of unconstructed SMR facilities to permit EA licensees to acquire unconstructed facilities from incumbents.²² Such a change would allow, and in many circumstances assist, EA licensees to satisfy their own construction obligations by allowing them to purchase SMR systems already under construction. This would accelerate the implementation of wide-area SMR service as desired by the Commission. Such buy-outs would also ease the relocation burdens faced by new EA licensees.²³

This alternative would avoid the unfair consequences of the Commission's current plan to eliminate the extended implementation

²¹ 800 MHz Order at para. 110 (emphasis added).

²² Under current rules, SMR licensees may not transfer licenses for facilities that are not fully constructed unless the transfer does not involve a substantial change in ownership, the transfer is involuntary, or the transfer is an incidental part of another transaction. See 47 C.F.R. section 90.609(b) (1995); Third CMRS Report & Order at 173 & n. 732.

²³ 800 MHz Order, at paras. 269-286.

period. Rather than produce the economic waste associated with terminating the authorizations of incumbents who do not succeed in completing their wide-area systems in the shortened construction period, this alternative would allow such incumbents to obtain some value for their investment in systems that cannot be completed in their shortened construction period.

Further, allowing transfer of unconstructed facilities for this purpose does not encourage spectrum warehousing. The statement in the 800 MHz Order that the Commission will "address spectrum warehousing concerns" by eliminating extended implementation ignores the careful balancing that is done before an extended implementation request is granted.²⁴ The Commission has previously stated that initial scrutiny of applications for extended implementation will be done carefully to ensure that slow growth rules are not used to warehouse spectrum.²⁵

Finally, creating an exception to the ban on unconstructed facilities would be far easier to implement than the elimination of extended implementation. With elimination of extended implementation, the Commission must analyze and rule on all incumbent extended implementation grantees' rejustification showings, establish new two-year termination dates, and then terminate licenses of those who are not done with construction.²⁶ At the conclusion of this process, the Commission may still face

²⁴ 800 MHz Order at para. 110.

²⁵ Extended Implementation Order, 8 FCC Rcd at 3977.

²⁶ 800 MHz Order at para. 111.

numerous requests for waiver of the shortened deadline.²⁷ Under the alternative solution proposed by Digital Radio, a minor change could be made to Section 90.609(b) of the Commission's rules²⁸ permitting transfer of unconstructed facilities to an EA license applicant or grantee by incumbent SMR licensees in the EA at issue. The Commission then need do little else, as it allows market-driven incentives to help clear spectrum for the new EA license bidders.

In sum, this alternative solution serves the public interest and all parts of the CMRS industry, including incumbent SMR providers, while avoiding the problems associated with eliminating extended implementation. In the event the Commission chooses not to reinstate incumbents' full five-year extended implementation periods, Digital Radio urges the Commission to adopt this alternative solution to the problems associated with the elimination of slow growth implementation.

²⁷ Id. at para. 112.

²⁸ 47 C.F.R. section 90.609(b) (1995).

CONCLUSION

For all of the above-stated reasons, Digital Radio respectfully requests that the Commission reconsider the proposals in the 800 MHz Order eliminating the extended implementation authority of incumbent SMR licensees.

Respectfully submitted,

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